CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1817.

East'n. District. *May* 1817.

DEGLANE vs. HIS CREDITORS.

DEGLANE vs. HIS CREDITORS.

Appeal from the court of the first district.

If a debtor does not make a cession of his goods, at the meeting of his creditors, the order for staying proceedings may be rescinded.

MATHEWS, J. delivered the opinion of the court. This is an appeal from the decision of the court below, whereby the usual order, in cases of the surrender of property, by an insolvent debtor, for staying proceedings against the applicant, was rescinded and set aside; whereon he appealed.

It appears from the record and statement of facts, agreed upon by the counsel of the parties, that the appellant filed his petition, in the ordinary form, praying for a meeting of his creditors, but that on account of some real or supposed irregularity in the procedings, at the time appoint-

East'n District. *May* 1817.

DEGLAND vs. HIS CREDITORS.

ed for the meeting, no surrender was made by the debtor. Sometime after, a supplemental petition was filed by him, praying for another meeting of his creditors, within the usual delay, at which he did not attend, either in person or by attorney; and no cession of goods was tendered before the notary.

Under these circumstances of the case the correctness of the decision of the district court cannot be doubted. Although creditors cannot refuse a surrender, made according to the forms of law, unless in case of fraud on the part of the debtor, yet, the rule can only apply in cases where a cession of goods has been regularly tendered to them, after they have been called together, at the instance of the debtor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Duncan for the plaintiff. *Porter* for the defendants.

GIROD vs. *MAYOR &c.*

Altho' the mayor's salary may not be reduced, during the service of the incumbent,

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims three thousand dollars for

the balance of a year's salary, as mayor of the city of New-Orleans. He obtained judgment and the defendants appealed.

he may agree to receive less, or that a part of it may be applied to other purposes, and his receipt for a less sum for his salary will bind him.

The facts, disclosed by the record, are these:

The plaintiff having been elected mayor on the 5th of October 1812, took the oaths of office, and his salary was fixed at four thousand dollars a year. He addressed the city council, expressing his intention to deal with others, as liberally as he was dealt with—desiring that one half of his salary might be applied to the payment of the mayor's clerk, and one thousand dollars of the balance to that of two additional commissaries of police, who were accordingly appointed.

On the 5th of October, 1814, he was re-elected: nothing was said as to the continuance of the allowance to the clerk and commissaries of police: but an ordinance was passed by the city council reducing the mayor's salary to one thousand dollars a year. It did not acquire any apparent legal effect by the signature of the mayor or otherwise, but the allowances to the clerk and commissaries of police were continued.

On the 5th of April, 1815, the plaintiff received from the city treasurer five hundred dollars, which he expressed to be, *for the two quarters salary, ending on that day.*

East'n. District. *May* 1817.

GIROD vs. MAYOR &c.

On the 5th of July, two hundred and fifty dollars were paid him, and he stated them to be *for the quarter ending on that day.*

On the 5th of September he received two hundred and fifty dollars, which he stated to be *for the quarter, to end on the 5th of October*, then following.

On or before that day he resigned his office.

The plaintiff's counsel contends that the ordinance of the city council would not have been valid, even with the mayor's signature—as the act of the general assembly, for the amendment of the act of incorporation of the city, forbids the reduction of the mayor's salary during the period of service of the incumbent, 1812, 6, *s.* 7.—that the plaintiff had, to the salary of four thousand dollars, an undoubted right, which was not affected by the allowance, made by the city council to the mayor's clerk or commissaries: which during the last year of his mayoralty, the period for which the balance of salary is claimed, was made without any authorisation on his part—that the proposition which he made, on that score, on his first election would not have been binding on any of their citizens elected in his place, and therefore cannot bind him on his re-election—that the one thousand dollars, which he received, can only reduce his salary *pro tanto.*

The defendants' counsel cannot insist on the validity of the ordinance: they would do it in vain, if it was cloathed with the mayor's approbation—but they contend that although the salary of an incumbent mayor cannot be reduced, nothing compels him to receive the whole or even any part of it: nothing prevents him to give a receipt for it, even without receiving one single cent—or to release it—that the release may be *express*, by a positive act, or *implied*. resulting from any act evidencing his intention to abandon it, wholly or partially—that, in the present case, *pars pro toto* was received, as in the opinion of the counsel, clearly appears from the plaintiff's receipts. Farther, that altho' the plaintiff, on his re-election, was not bound to consent to the continuance of the allowances to the clerk of the mayor and to the two commissaries of police, out of his salary: yet his silence either evidences his consent or is a *suppressio veri*; a fraud on the defendants: since it induced them to continue two officers taken in the employ of the city, at the instance of the plaintiff, on his assurance that their services, tending principally to his ease and convenience, would occasion no expence to its coffers.

The plaintiff's counsel reply that a receipt of

East'n. District. May 1817.

Girod vs. Mayor &c.

a part for the whole, being a donation, must be fully proved, and cannot be assumed on a mere presumption.

The court cannot assent to this last proposition. The maxim is *nemo* FACILE *presumitur donare*. "The abandonment, *remise*, of a debt," says Pothier, "may be made by a tacit agreement, resulting from certain facts, which cause it to be *presumed*." 2 *Traité des obl. n.* 577. He gives us an instance of such presumption, drawn from the law *Procula*.

Procula had received a large sum of money, to be handed to her brother. After his death, she pleaded that he had abandoned the debt to her. There was no other evidence of the abandonment, except that which resulted from three circumstances, which Papinian held to suffice: *consanguinitas, rationes sæpius patatæ, diuturnitas temporis* consanguinity, accounts often settled and length of time.

This court, being of opinion that the defendants may shew, by presumptive evidence, that the plaintiff reduced his claim to the sum of one thousand dollars, which he received in discharge of his salary, the decision of the case now rests on the simple question of fact, viz. do the facts in the case sufficiently prove this sum of one thousand dollars, to be a *pars pro toto*, which (with the allowance of two thousand dollars, to

the clerk and commissaries) was by him received in full of his salary during the last year of his mayoralty? If this question be solved in the affirmative, the surplus was abandoned and the defendants may repel his claim thereto by the exception in the *C. 2, s. 1, ff. de part. Videtur inter nos convenisse ne peteres.* Then was the relation of debtors and creditor dissolved, and no alteration of the plaintiff's mind can cause it to revive.

Taking the three circumstances, stated the law *Procula*, as affording a sufficient presumption of an abandonment—let us examine whether those relied upon by the defendants are less weighty.

I. Consanguinity. Here this circumstance (one of the parties being an artificial person) cannot exist. But a relation between them occurs, which the Roman law considered in this point of view, as equipollent to consanguinity. The Romans, says Pothier, considered pollicitation as obligatory, when made by a citizen to his city, when he had a just cause, *puta* in consideration of some municipal magistracy given him *ob honorem*, or when he had begun to put it into execution. *L. 1, s. 1, & 2, ff. de Pollicit. Tr. des ob. n. 4.*

East'n. District. May 1817.

GIROD vs. MAYOR &c.

II. Accounts often settled. Thrice did the plaintiff make his demand on the coffers of the city expressly stating it, without any notice of what is now contended by the plaintiff's counsel.

On the 5th of April, 1815, two quarters of the plaintiff's salary were due, amounting, according to the present calculation of his counsel, to two thousand dollars. If, as the opposite counsel suggest, the plaintiff had yielded his assent to the wishes of the city council (that he should receive his salary at the rate of $1000 a year,) conveyed in the ordinance which passed that body, five hundred dollars only were due: this last sum did he receive, and his receipt states it to be for his salary during the six months *ending on that day*. Nothing was said, as to the one thousand five hundred dollars, which on that day were due him, if he meant not to yield his assent to the reduction. If his mind had not been made up on the subject, if he meant to retain the right of insisting on something more, would not the receipt have been *on account of*, or *in payment of a part of my salary*, &c.?

On the 5th of July, when, according to our hypothesis two thousand five hundred dollars were due him, and according to the other two hundred and fifty dollars only, the other sum is received and expressed to be for the mayor's salary *for the quarter ending on that day*. The

two sums now received made that of seven hundred and fifty dollars. According to the plaintiff's counsel, two hundred and fifty dollars were still due on the *first* quarter, receipts were in the treasury for the *two first* quarters and the plaintiff now signed a receipt for the *third*; while it is held that the fourth part of the first quarter's salary and the whole of the second and third were yet due.

On the 5th of September, two hundred and fifty dollars were received by the plaintiff: this sum added to the two others made one thousand, the amount of the first quarter's salary, reckoning as his counsel now does. Receipts, it has been observed, were signed for the first, second and third quarters. The last quarter had not become payable, yet the receipt purports that this sum of two hundred and fifty dollars is for the quarter, *which is to end on the 5th of October following*. This was avowedly a payment in anticipation, an indulgence which the plaintiff's convenience required. Yet where was the need of it, if (as his counsel suggests it) the officer did not consider the preceding receipts, *in full* for his salary, as barring him from any claim on the part of the salary thus abandoned.

Is it common, does it generally happen that an officer who receives only one quarter of his sala-

East'n District. May 1817.

Ginop vs. Mayor &c.

ry, gives receipts for the three first quarters of the year and for the last in advance? It is impossible to answer that question in the affirmative. The conclusion appears to us irresistible that the last sum of $250, paid to the plaintiff in August, was not received in part payment of his salary during any of the preceding quarters: but that it was, as he expressed it, for the last quarter not yet expired, and in anticipation. The treasurer would have been startled at the proposition of making a payment, out of the course of business, in anticipation of the last quarter's salary of an officer, not fully paid for the first, and who had already signed receipts for the first, second and third quarters, without receiving any thing for the second and third.

III. In the case cited out of the digest, *length of time* is presented as one of the circumstances inducing the presumption of the abandonment of the debt. *Diuturnitas temporis*.

The statement of facts shews that soon after the last payment, the plaintiff resigned his office. His petition is the first evidence of any claim on his part, and bears date of the 13th of Nov. 1816, thirteen months after. This length of time does not perhaps satisfy the expression, *diuturnitas temporis* of the digest, but there are other circumstances which did not occur in the case

ated, where no disposition to liberality appeared, except that resulting from consanguinity. In the one under consideration, the plaintiff, on his first coming to office, alive to the sense of gratitude which his promotion inspired, (and which the Roman law considered as so reasonable a ground for liberality, that it rendered a *pollicitation* arising from it obligatory) that he at once reduced his salary to one half. If the penury of public resources, or any other consideration, induced a belief in the council that its first magistrates would at their suggestion, reduce his expectations still more, and we find him doing, while in office, every thing, which consistently with his duty he could do, evidencing a disposition to concur in their wishes, from whence is a presumption to arise that his former liberality had yielded to the determination of concealing his designs under ambiguous expressions, in his receipts, in order to secure to himself the means, one year after his resignation, to draw out of the coffers of the city, a sum which he induced the council to believe it was his intention to leave there?

We think that the plaintiff's determination to accept the $1000, he received during the last year of his mayoralty, instead of the 4000 dolls. to which he was entitled, is clearly to be presumed. It is useless to examine his right to the

East'n District. *May* 1817.

GIRON vs. MAYOR &c.

2000 dollars paid to the clerk and commissaries of police.

It is, therefore, ordered adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs of suit in both courts.

Mazureau for the plaintiff, *Moreau* for the defendants.

DUCOURNAU vs. *MARIGNY*.

Appeal from the court of the first district.

The reservation of *un PASAGE de treinta pies, para los efectos que me sean convenientes y importantes*, in a Spanish deed, is a reservation not of a right of way, but of the soil itself.

DERBIGNY, J. delivered the opinion of the court. Laurent Sigur had bought from Gilbert St. Maxent, for the sum of seventy two thousand dollars, a tract of land extending from the river Mississippi to the Bayou St. John, on which was a saw-mill and a canal emptying into that bayou. In 1797, he sold to F. Riano, for two thousand dollars, the least valuable part of that land; and six months afterwards he sold to the defendant's ancestor all that he had not conveyed to Riano. In the deed to Riano, Sigur had made the following reservation: "*reserva-*

dome un pasage de trienta pies de les dos bordos del enunciado canal, para los efectos que me sean convenientes y importantes, en caso de necesidad, con toda la profundidad de el:" reserving to myself "a passage of thirty feet on both sides of the said canal, for the purposes which may be convenient and important to me, in case of necessity, with all the depth of it;" the plaintiff, here the appellee, contends that the reservation is only that of a right of passage, along the canal within the space of thirty feet. The defendant and appellant insists upon its being a reservation of the soil itself. A correct interpretation of this clause is the first step in the decision of the case.

It must be premised that the plaintiff does not dispute to the defendant the property of the canal, but only that of the thirty feet reserved on each side of it.

The word *pasage*, used in the deed, has created the ambiguity which gave rise to this suit. Yet it is not so much the word itself, as the manner in which it is placed, that has made the phrase a subject of dubious meaning: for had it been said that the vendor reserved thirty feet for a passage, no room would have been left to doubt that he reserved the soil itself, per-

Mar'n. District
May 1817.

DUCOURNAU
vs.
MAYNOR.

haps under an obligation not to use it for any thing else than a passage on road: a promise surely of some importance to the purchaser of a tract of land bordering on a water course. Instead however of a reservation of thirty feet for a passage, we have here a reservation of a passage of thirty feet. Does this mean only a right of passage over thirty feet? If we weigh the expression of the clause, in the language in which the contract is written, we see that *pasage* in Spanish signifies the act of passing, or the place over which we pass, but never the right of passing. There are three sorts of rights of way known to the Spanish laws, each of which has its particular name. The right to pass on foot is called *senda*: the right to pass on horseback, *carrera*: that of passing with carriages is named *via*. They are the equivalents of the latin words *iter*, *actus* and *via*. These are not mere technical expressions: they are descriptive of the right. But the word *passage* alone does not mean any right of way at all; and when described to be thirty feet wide and to run on both sides of the canal, it evidently means something more. Let us see if the other parts of the clause will not explain this.

The vendor owned a saw mill, the canal of

which ran through his lands down to the bayou St. John. On selling part of these lands, he reserved a passage of thirty feet *on both sides* of the canal, and the canal itself in all its length, *"un passage de trienta pies de los dos bordos del enunciado canal, con toda la profundidad de el."* Can it be supposed that he meant to reserve not a foot of ground on the edge of the canal; that he gave up the right of widening it, if necessary; that he kept the bed of the canal to himself, and left the bank of it to another; or, if that bank is to be considered as part of the canal, how far shall it extend? Where is the line which is to divide that bank from the land of the neighboring owner? Is it not evident, that the limit of the thirty feet was intended to be the dividing line between the two proprietors. If that be not the true intent of the reservation, what can be the meaning of these other words, *"para los efectos que se vean convenientes y importantes in caso de necesidad?"*—A right of way can never be more nor less than the right of passing by on foot, on horseback, or at most with carts and carriages. What then can be these important purposes for which the reservation is made? Something more is certainly intended to be secured thereby than the mere right of passing. The owner of the canal might find

Bast'n. District. *May* 1817.

DUCOURNAU vs. MARIGNY.

it *convenient* or *necessary* to widen it; he might apply the canal to some more *important* use; he might find it his interest to establish a public road along it; in short, he wished to be at liberty to do with it, as further circumstances might require; he therefore reserved a passage of thirty feet *on each side* of it, for the purposes which might be *convenient* and *important* to him. Does that sound as a simple reservation of a right to pass? We think not.

Should there, however, remain any doubt as to the true sense of this clause, we must next examine whether the subsequent agreement, which took place between the parties, has not removed the uncertainty, if any existed, as to the nature of the reservation.

By the sale to Riano, it had been agreed that the property sold should be surveyed, and that boundaries should be planted to separate the respective lands of the parties. That operation was performed, the 28th of March 1800, in presence of Peter Marigny, the defendant's ancestor, and of Anthony St. Maxent and Francis Rochebla[illegible], the then acknowleged proprietors of Blanc's tract. By that survey it was found that the lines of that tract, on the S. E. side of the Gentilly road, could not be run, as far as they were de-

signated in the sale, part of the land described being the property of other more ancient owners. The survey was therefore suspended until the interested parties should agree among themselves as to what should be done. According to the description, given in the sale, however confuse it may be in other respects, the whole of Riano's land on the S. E. side of the road was to be situated on the left side of the canal; all the land on the right side was consequently part of the tract sold to P. Marigny, who had bought from Sigur all that had not been sold to Riano. In that state of things an agreement, recorded by the surveyor in his process verbal, signed by all the parties, was entered into, according to which a line crossing the canal at right angles was run through the land, lying on the right side, so as to make up the deficiency in Riano's tract out of Marigny's purchase. At the same time and in the same *proces verbal*, P. Marigny stipulates a reservation in these words: "*bien entendido que el susdicho Pedro de Marigny se reserva los treinta pies de los dos bordos del canal:*" "It being well understood that P. Marigny reserves to himself *the* thirty feet on both sides of the canal." This reservation of *the* thirty feet, whether it applies only to the part then abandoned or to the whole, is equally expressive of the inten-

East'n. District. May 1817.

DUCOURNAU vs. MARIGNY.

ion of the parties, and of their understanding of the reservation made by Sigur. It is no longer called a passage of thirty feet, but *the thirty feet*. Thirty feet of what! Thirty feet of passage? the construction would be ridiculous. No: they are the thirty feet of ground, reserved by the vendor, for a passage.

The declaration of the parties would be sufficient, if made voluntarily and gratuitously; but from the circumstances of the case, we see that it was given for a consideration. The agreement recorded in the *proces verbal* is clearly, though not expressly, a compromise by which the parties with a view to remove the difficulty which might have arisen from some ambiguity in their titles, have made to one another mutual concessions.—In vain is it said that this agreement is not such an act as the laws require for the conveyance of real property. The property of the thirty feet was not here conveyed to Marigny, but recognized by the other parties to be in him. The agreement does not contain a conveyance, but yields a doubtful pretention to the party who has the best claim. It has put the question at rest in the same manner as if judgment had passed thereupon: *Non minorem auctoritatem transactionum quam rerum judicatarum esse, recta ratione placuit. l. 20. C. de trans.*

As a confirmation of this, we might mention the subsequent conduct of the parties, in carrying the contract into effect in conformity with the above interpretation, as the record shews; but enough being found in the written instruments to pronounce in favor of the defendant, we will avoid entering uselessly into the investigation of any question relative to the admissibility of the oral evidence produced.

It is ordered, adjudged and decreed that the judgment of the district court be reversed, and that judgment be entered for the defendant, with costs.

Turner for the plaintiff. *Moreau* for the defendants.

DELACROIX vs. *BOISBLANC.*

A tutor by nature, removing out of the state, retains the tutorship.

APPEAL from the court of probates of the parish of New Orleans.

DERRIGNY, J. delivered the opinion of the court. The defendant and appellee being about *permanently* to remove from this state, with her minor children and the best part of her fortune, an

East'n District. *May* 1817.

DELACROIX vs. BOISBLANC.

application was made by the plaintiff and appellant, as under-tutor of those children, to obtain from her an account of her administration, and to cause another tutor to be appointed in her stead, as provided for by our civil code, *book 1st. tit.* 8. *chap.* 1. *sect.* 9. *art.* 69 and 70.

The account has been rendered, and so far there was no resistance on her part; but she refused to surrender the tutorship of her children, alleging that tutors by nature are not subject to the dispositions of the above quoted law.

The question if it be one, may be reduced to this: can the law appealed to by the applicant embrace cases where a parent leaving the state takes his children along with him?—That all men have a right to expatriate, at least when by such removal they cause no prejudice to the community of which they were members, is not questionable in a free country:—that a natural tutor expatriating has a right to take his children with him is still less disputable. How then could the law, providing for the nomination of another tutor, be carried into effect in such a case? A tutor is appointed principally over the person of the minor; but here the minors are gone. He is to take care of them in the manner prescribed by our laws; but they are beyond the reach of

those laws.—It is clear that the provision alluded to is made for cases where the tutor alone is going away, or where he can be prevented from taking his ward out of the state. This would take place, we presume where any other tutor than a parent would be about absenting himself. Such a tutor, being merely the creature of the law, would probably not be at liberty to carry his ward where that law does not extend. The nomination of another tutor is then obviously necessary. But, when the ward himself is removed where our laws can no longer protect him, there must be an end to the interference of our courts in his behalf.

The same reasoning applies to the curatorship of one of these minors; his absence from the state must be attended with the same consequences.

We are upon the whole, of opinion that this case is not within the purview of the law referred to. But as the present application was made by the appellant evidently with no other view than to promote the interest of the minors, we think he ought not be burthened with the cost.

It is adjudged and decreed that the appeal be dismissed, and that the costs be paid by the

Eas'n. District. *May* 1817.

DELACROIX vs. BOISBLANC.

appellee or her representative, out of the funds in her hands belonging to her minor children.

Seghers for the plaintiff, *Paillette* for the defendant.

FORTIER vs. M'DONOGH.

Individuals summoned to work on the levee of a delinquent planter are to be paid out of the treasury of the parish and have no action against him.

Appeal from the court of the parish and city of New-Orleans.

The petition stated, that plaintiff made certain works on the defendants' levee, who having been notified to make certain repairs thereto, in conformity with the regulations of the police jury, neglected and refused to follow the directions of the syndic, in the delay prescribed by the said regulations, whereby the plaintiff became entitled to demand of the defendant $372, the value of said work.—For this he had obtained judgment in the parish court, and the defendant has appealed.

The original answer denied the plaintiff's right to an action, pleads the general issue and an amended one set forth that the sum, claimed

by the plaintiff, had been paid him out of the treasury of the parish.

Turner for the defendant. This case, will be found by the court, to be one of easy decision; but

It contains many errors, and is attempted to be supported by principles so novel, in the law of actions, that we must consider it under several aspects.

1. We will consider it as a civil action, for the recovery of a private right. And on so doing, we shall shew the action, to be misconceived, and ill founded.

2. We shall consider it as an action ostensibly by an individual, but in reality, one commenced by the police jury, for the recovery of a duty, which is claimed by the parish, of a delinquent. And in so doing we shall find it equally misconceived and ill founded.

I. By recurring to the law of actions, we shall find that there must be a right, in the plaintiff, to recover some thing, arising either *ex contractu*, or *ex delicto*. 1 *Chitty's Pleadings*, 1, 2, 3. *Cowp. Inst.* 126, 7, § 1.

Cases arising *ex contractu*, are those of express contracts, and those of *implied* contracts,

East'n District. *May* 1817.

FORTIER vs. M'DONOGH.

or *quasi* contracts. *Domat, pub. law, lib.* 4, *tit.* 1, § 12.

Cases arising *ex delicto*, are those which depend on some injury, done to, or sustained by, the plaintiff, in his person, character, or property, arising by some wrong done by the defendant, or by some omission to perform a duty. Causing damages to the plaintiff.

In every case, the plaintiff must shew, in his petition, such a cause, as will intitle him, to recover of the defendant, if his facts are true. *Acts of* 1805, *pa.* 210.

For unless his case, as by himself stated, be sufficient; he cannot supply it by evidence; by the rule that the proofs, much accord to the allegation.—

No such cause is here stated by the plaintiff. he founds his right of action, upon some alleged police rules and some labour done by him, in pursuance thereof. Here we are presented with several considerations, as

1. Are there any such police rules?

2. Has there been the work done?

3. Was the work necessary, and has it been undertaken according to the laws of police?

All these things, must not only fully appear on the petition, but they must appear to be lawful in themselves.

1. The general police rules, as made and promulgated, under date of the 6th July 1815, give no such prices, ordain the performance of no such duty, nor do they afford any such action as the present.

What then? Are there any other police rules? There are none shewn.—

There is indeed an extraordinary proceeding, of some members of the police jury, convened contrary to law, consisting of less than a lawful quorum: and which are not rules of police, but a special decree, affecting a single person, without his being a party thereto, or even having any knowlege of such proceedings; a proceeding wholly illegal.

By the act of 1813, the jury of police must be composed of a majority of the members elected, who are twelve in number; and at least one third of the justices of the peace, *in commission in the parish*, and they shall meet on the first Monday in every year, at the seat of justice.

As a tribunal, created by a special law, for special purposes, and with limited and special powers; those who claim rights [illegible] performance of duties, under the rules or ordinances [illegible] a special tribunal, must shew themselves intitled by the very letter of the law.

By comparing these police rules, with the

East'n District. May 1817.

Forman vs. M'Donogh.

acts of the legislature, creating them, and defining their duties and powers, they will be found to be illegal and void. But admitting, for sake of argument, that they are valid, then there is no right given to the plaintiff, to institute this action.

His claims are against the parish treasury, and that treasury are provided with a certain and special remedy for the reimbursement of such sums as they lawfully pay for the wilful neglect of the proprietor.

2. This work could only be done, in consequence of an undertaking by the job, as is provided by the act of assembly of 1807, or by day labour by order of the parish judge, in case of default of the proprietor, after notification.—These are the only legal modes.

If it was done by contract, at a letting by the job, then the plaintiff should so have stated it; but not having stated it, we cannot presume it, and especially as the contrary is stated by him in his petition.

If it was done by day's labour, it should have been so stated, and the price per day is one dollar, fixed by the same law of 1807. But the petition states, not that fact, but the contrary; it goes for work done by the cubic toise, under certain pretended rules.

Therefore no work has been done for the defendant by the plaintiff, in pursuance of any contract by the job, or by day labour, by order of the judge, nor in the obedience of any law of the state.

3. The works must be necessary ones, to wit, such as the defendant was legally bound to perform, and which he had neglected.

It appears not that the works were necessary, it is not even so alleged; what right therefore has the plaintiff to work on the defendant's land; and then to come for pay, if he does not shew he has done a necessary work for him, and one he was bound to do for himself? It is not only not shewn to be a work, the defendant was bound to make, but by the proof, it is fully shewn, that it was not necessary, nor was the defendant bound by any law to make it.

II. There is nothing more certain, in the law of actions, than this; that he who claims as plaintiff, must have the legal title or the equitable right to enjoy the thing sued for. *Hardin's Rep. 561 to 564.*

Nor can any person, or body corporate otherwise another to sue in a different name without transferring the title by legal form to such person, or by his having an equitable right to

East'n District. *May* 1817.

FORTIER vs. M'DONOUGH.

the enjoyment of the thing, the naked title whereof is in another. 2. *Bay's Rep.* 519, *Civ. Ca.* [illegible] *art.* 6.

Let us therefore examine if the parish has either the legal title to recover of the defendant the sum sued for, [illegible]

Have they the equitable right to the enjoyment of the thing, the legal title whereof is in the plaintiff?

1st. If the work done, or pretended to have been done by the plaintiff, and thirty others, was a work done for the parish, and by virtue of any legal authority, then their claim was upon the parish, for payment. And the legal right and title was vested by law in the parish to sue in the most summary way for the reimbursement. 1807, *pa*, 132, 15.

The planter ordered to do a work under the police laws, and failing to comply, necessarily submits himself to the rigour of the law.

In such case the work which he has neglected to perform, must be done by the parish and the costs of the parish equally portioned among [illegible] 1807, *pa.* 132, §. 2.

[illegible] employed by the parish trust not to the credit of any single person. They trust only the parish with whom the contract is made.

They cannot be compelled by the existing

laws to resort to the private fortune of any one, for the price of the work, and it would be unjust to compel them to do so.

There is no privity of contract, nor any privity of interest between the defaulting planter, and the undertakers for the parish.

We must never forget that the duty devolves on the parish, to do the work, upon the default of the planter. And they may cause it to be done by the job, or by day's labour. 1807, *pa.* 131, § 4.

And whether in the one mode or in the other, the workmen have their demand for payment, only on the parish—They have no right to sue the defaulting planter.—Because another remedy is given.

In this case, it is contended for the parish, that they have paid the plaintiff, and have not any right to sue but in his name. But

According to my interpretation of the law, his name cannot be used for divers reasons, as

1. Because a special remedy is given to the parish by the act of assembly to make by laws, and to enforce obedience from [illegible] make contracts, in certain subjects and [illegible] force the performance of them. 1807, *pa.* 132. 1813, *pa.* 156. *Abr. of corporation police rules of* 1815.

East'n. District. May 1817.

Fortier vs. M'Donogh.

3. But to deny them the right of proceeding in the manner pointed out by law, for the reimbursement of the expenses, in such cases, would be to deny the power of providing for the redress of evils by the police, in cases of disobedience of individuals, and of making contracts for public works.—A principle inadmissible.

3. Because they have only a special power to do certain things, and in a certain way, and as such, they cannot do more, nor in a different manner: they have power neither to make, nor to receive assignments of obligations; they have no power to make contracts but in relation to the subjects of police. 1807, 1809, and [illegible] *before quoted.*—*Civ. Co. 4. art.* 13, 2 [illegible] *to* 182, *Cowper* 29. *Hardin* 94. 4 *Bac.* [illegible] 661. *ca.* 6.—1 *Cranch* 71, *the whole case.* 3 *Cranch* 127.

Therefore the supposed agreement by them, made with the plaintiff, and all other of the planters, whom they say worked on the defendants' levee, to institute and prosecute separate suits against the defendants for the use and benefit of the parish, is one not authorised by law.

Neither could the plaintiff maintain such an action without authority of the parish, nor with it. He had it not and they could not give it.

As well might the corporation of the [illegible]

attempt to maintain a suit in the name of its cashier, for a corporate right. 1 *Bac. Ab.* 504, 5, 6, 7, *letter D. and E.*—2 *Cranch* 127.—

As well might the corporation of the city use the name of its treasurer, or of any one of the parishioners, in suits for corporate rights, as for the parish to make use of the name of the plaintiff to enforce obedience to a parish duty. 1 *Bl. Com.* 475.

2dly. The parish have not only the equitable right to enjoy, but also the legal title to enforce the reimbursement of the sum expended on contracts legally made, to meet the public exigency in case of default on the part of the individual bound by law to make a work prescribed.

When therefore the legal title and equitable right meet in the same person, there is nothing in any one else to found an action upon. *Hardin* 561, *&c. Bay* 519.—

"An action" says Justinian, "is nothing more than the right of suing in a court of justice for our lawful demands." *lib.* 4. *tit.* 6. *Co. Lit.* 285. *a.*

By this rule the plaintiff, Fortier, not [illegible] originally the right to demand of the [illegible] the payment of the work by him done in pursuance of orders from the parish judge, could not maintain any action in court for it.

East'n District. *May* 1817.

FORTIER vs. M'DONOGH.

But it is contended his name is used by the parish to sue for their use, and the common [illegible] of an action in the name of the payee of a note, for the use and benefit of a purchaser of the note, is introduced as an authority for this.

Before any example can be received as an authority, its similitude in fact and in principle must be admitted, let this be examined.

In the case of the note, the payee had the legal title to the action, and might exercise it for whose benefit he pleased, or he might transfer it to whom he pleased, in full right.

But if he had not the legal title to the thing, I should be obliged to my adversary to inform me by what law he maintains an action in his own name, for the use and benefit of another? *See the cases before quoted.*

Here the parish endeavour to derive title to the proceeds, from the plaintiff, whereas the defendant is a creditor of the parish, and sues to recover a debt due to the parish, if due to any one, that he may enable the parish to pay him the sum they owe him!!

[illegible] to maintain this action, in the name of Fortier, are the parish driven to the miserable shift and pretence of placing him in their own stead, to sue for a right due to themselves, under the false pretext, that it was due to him, and

that they have acquired a derivative right from him.

And this is done too in the face of a law, giving to them a specific and summary remedy to reimburse themselves, not for the part of the sum by them laid out, but for the whole expenditure occasioned by the defendant's delinquency.

It is deemed sufficient to defeat this action that we shew, there never was or could be any privity between the plaintiff and defendant, for the rights by him demanded, without resorting to the inconveniency and burden, as well to the parish as to the defendant, of deviating from the rule prescribed in the special laws, in relation to this subject.

But as the defendant deems it extremely vexatious to be obliged to defend himself in court against twelve suits, instituted against him in this manner, it is my duty to lay the whole matter fully before the court.

If we admit, for the sake of argument, that the defendant is indebted to the parish, for disbursements made by his delinquency, in a sum of several thousand dollars, it is but a sum in gross, and is the ground of one action only.

How therefore is it to be maintained, on what principle of law, equity or justice, that this one demand shall be split and divided into twelve

East'n. District. *May* 1817.

Fortier vs. M'Dossen.

suits, or as many more as there were persons called to the work?

In the common case of an account made up of several items, created at several times, there can be but one action for the whole.—No man would be allowed to proceed in a separate action, for each separate item in his account: such an attempt would be viewed with indignation by the court. In such a case, as the one supposed, the court would order the actions to be consolidated: the court would order the plaintiff to pay costs in all but one of them!

But what would be done with a man who, having such an account, should set forth as many different plaintiffs, to sue as many different suits, as there were different items in the account? The court would be struck with amazement at such an abuse of the judicial process. The actions would all be dismissed. The plaintiff condemned in the costs, and subjected to a prosecution for baratry.

Such therefore has been the conduct of those who have the management of the police of this parish, under the pretence of having disbursed in payments to twelve inhabitants the sum of $3488,50, which the defendant should reimburse to the parish treasury, if the payments had been justly made for his delinquency.

The parish officers, instead of proceeding by the means prescribed to them, in the law, for the reimbursement of that sum, have caused twelve suits to be instituted by the persons, to whom the money has been paid, or was payable, for the recovery thereof, for the use of the parish and the reimbursement to the treasury of the said sum.

Can such a proceeding be sanctioned by any impartial tribunal? Are there any principles of law or equity to support such a measure? Shall we not therefore resent it with indignation as vexatious and oppressive to the defendant? But again. The defendant may have a just cause to resist the claim of the parish.

We have no means to prevent the parish officers from employing what workmen and paying them what prices they please. But, when we are called upon for the reimbursement, we have a right to resist the demand, unless it is such as is sanctioned by law.

Nothing is more evident than this principle, that no man nor set of men, whether corporate or incorporate, can take from me with impunity my property, but by the law of the land, or the judgment of the courts.

Therefore when the parish, as well as when an individual, shall make a demand on me, for

East'n District
May 1811.

FORTIER
vs.
M'DONOGH.

the performance of some labour, or for the payment of a sum of money, I have the right of calling to him your demand is not a lawful one, and I will not pay, nor perform until I am heard in a due course of justice. And shall I be deprived of this right, by any evasion or artifice of the demandant? or shall I be so burdened with the multiplication of suits, by a third person, as to be compelled to submission, without the power of resistence, or shall I be compelled to make my defence twelve times over, and under all the disadvantages of meeting a masked enemy? Shall I be compelled to meet my adversary, not directly and face to face, where my defensive arms would strike home upon him, but through one put in advance, acting the puppet's part of an ostensible person, but in reality only as a shield or mask to cover, and conceal the juggler behind the scene.

Moreau, for the plaintiff. The regulation of the police jury could not destroy the right of action, which the plaintiff had against the defendant, for the payment of the work done to the defendant's levee, nor compel him to wait for the payment out of the parish treasury.

The legislature itself could not have enacted a similar law, and if it had been enacted, it would have been unconstitutional.

No one can be compelled to yield his property even for the public use, without a just and previous compensation. *Const. U. S. art. 7 of the Amendments. Civil code* 103, *art.* 1.

Can it be said that the compensation would be just and previous, if the parish could force a planter to perform the work of another and wait for his payment, till it could be obtained out of the parish treasury; which is often for several months empty. It is clear that such a disposition would be as unconstitutional, as one by which my slaves should be taken from me to work for another, to be paid on a particular day, or when he could have funds to pay for their work. The police jury ordering that planters who might work on the levees of others, should be paid out of the parish treasury, has only given them an additional surety, without intending to destroy the direct right of action against him whose work they might be ordered to do. Thus every day a man binds himself to pay the debt of another, and his obligation is only an accessary to the principal one, which it strengthens, but does not impair or destroy, unless on account of a special stipulation. 2 *Pothier on obligations*, 559.

II. The plaintiff indeed cites the regulation of the 6th of July 1815, in his petition—but with

East'n District
May 1817.

Fortier
vs.
M'Donogh.

the only view to shew that planters are bound by it to send their slaves, on the demand of the judge, to work on the levees of their delinquent neighbours. Having then been required to work on that of the defendant, and having worked accordingly, there results from this very work an action for compensation against the plaintiff. The present one is not grounded on this regulation which allows two dollars per day for each slave; for he claims three dollars per cubic toise under that of the 3d of September following.

III. The act of April 6, 1804, §. 4, provides indeed that the judge shall compel delinquents to pay the works done to their levees, even by the seizure of their property: but it would be absurd to pretend, that on such a case he could proceed *ex officio*, without a previous demand of the party interested.

The law requires in every action three distinct persons, *actor, reus et judex*. Every action is to begin by a petition containing the names and residences of the parties, the ground of action and certain detail of time and place, 1805, c. 31.

This is admitted, but it is pretended that the rigour of these forms may have been dispensed with by the legislature in certain cases, and it has been dispensed with in this, by ordering the

judge to compel payment—a form of proceeding said to be not more extraordinary than the recovery of certain fines, which is obtained on a rule to shew cause.

The act of the 6th of April 1817, provides simply that the judge shall compel payment, but not that he will prosecute: which would be absurd. The legislature had it in view, in this act to give exclusive cognizance to the parish court, and the judge could only compel payment in the ordinary way by judgment and execution. This is the construction which the supreme court put on this act, in the case of *Syndics &c.* vs. *Mayhew*, *ante* 175, in which the parish judge had granted an order of seizure *de plano*. Yet in that case a petition had been presented, and there were *actor, reus et judex*.

Further, the 7th article of the amendments to the constitution of the U. States, requires that in every civil suit, above twenty dollars, the facts should be tried by a jury. How could then a jury have passed on a case in which no issue was joined?

In prosecutions for a fine, no petition in general is required, the question being merely whether the law had been contravened. Yet, in such a case, there is always a party plaintiff, at whose instance the judge grants the rule to shew cause.

East'n. District. *May* 1817.

Fortier vs. M'Donogh.

Fines are decreed to the state, the city or a former, who may stand in court, and it is their application, that proceedings are had. The judge never proceeds *ex officio*. In the present case, as the parish is not incorporated, if the judge acts, he must be plaintiff himself.

The object of this suit, is not a fine, but a claim grounded on several distinct facts, which ought to be alleged in a petition and tried by jury, if either of the parties desire it. The plaintiff had to prove that he had been called upon, that he had wrought on the defendant's levee, the extent and value of the work he had performed.

IV. The payment, received from the parish treasury since the inception of the present suit, has not destroyed his claim against the plaintiff, if as has been shewn it really existed. He brought his suit on the 12th of June last and on the 27th of the following month he received his payment. Till then, he had proceeded regularly and is entitled to his costs.

He has at all events a right to proceed to judgment for the benefit of the parish. There is no inconveniency that when a third party pays the sum due to the plaintiff, he should use his name to obtain his reimbursement, especially

when he payment was not made, with the view of discharging the debtor, and was accompanied by a subrogation of the rights of the creditor.

One, says the law, may pay the debt of another without authority from him, and even without his knowledge, *Code Civil* 287, *art.* 136. 2 *Pothier on obligations, n.* 163.

In order that the payment may operate the extinction of the debt, and consequently of the action, it is necessary that he who makes it, should pay in the name, and for the discharge of the debtor. *Ib.*

But when the payment is made by a third person, in his own name, and with subrogation of the rights of the creditor, neither the debt nor the action are thereby extinguished, and both continue in the person of the payor and assignee. For this payment is reputed to be less an act of liberation than a purchase of the rights of the creditor for the sum paid him. *Ib.* 522.

It is true the parish has paid the plaintiff, but not with a view of discharging the defendant, as appears by the receipt taken by its treasurer. The debt continues to exist in favour of the parish, who has succeeded to the rights of the plaintiff.

The parish is subrogated to the rights of the plaintiff.

East'n. District. *May* 1817.

FORTIER vs. M'DONOGH.

Subrogation is conventional or legal. When it is conventional, it must be express and made at the time of payment; but when it is legal, it operates tacitly and by the sole effect of the law. *Code civil* 288, 290. *art.* 149, 150.

The parish, being bound by the regulation of the police jury, to pay for delinquent planters, is of right subrogated to the rights of those who performed the works neglected by the delinquents; as soon as it pays them. *Code civil* 190, *art.* 51, *n.* 3.—Being thus subrogated to the plaintiff's rights, it may lawfully continue in his name, the suit which he had commenced.

A subrogation is rightly assimilated to a cession of rights and actions and produces the same effects. And it is in every day's practice, in the cession of litigious rights, where the assignor has already instituted a suit, that the assignee uses the assignor's name to obtain the recovery of the debt till judgment. It is not easy to see how this can be disadvantageous to the debtor: the law has however provided that, if he can shew that the transfer of the claim has been made for a less sum than the nominal one, he may obtain his discharge by the payment of the sum paid by the assignee. 2 *Pothier, contrat de vente, n.* 596.

I conclude that the parish can legally prosecute the suit, in the name of its assignor.

On the merits, it is contended, that the police jury could not alter by a special regulation on the 30th of September 1815, what had been generally provided by that of the 15th of July.

It is true that generally equal laws must be made for every part of the community. There are, however, special cases in which this principle must be deviated from. When a short time ago the waters of the Mississippi made their way through a huge *crevasse* in the levee, a few miles above New-Orleans, and threatened the city with destruction, no one complained that immediate regulations were resorted to; because those that had been provided were insufficient to avert the impending evil. Such was the case when the police jury passed the special regulation complained of. During the preceding summer, a crevasse in the plaintiff's levee had inundated the land around his plantation and destroyed the crops of his neighbors. His levee has a length of thirty arpens, and was to be made entirely anew. He had been ordered, as early as the 9th of August, to put two hundred negroes on his levee, as a less number could not have completed the work required, before the month of November, the period at which the regulations required it to be completed: and in the latter part of September the work was so little advanced, that a

East'n District. *May* 1817.

FORTIER vs. M'DONOGH.

requisition of every working hand in the district became necessary to the completion of the work, while every planter had need of all his hands either to repair his own levee, or attend his crop.

In these circumstances, the police jury, on the 30th of September, 1815, desirous, as the preamble to their resolution expresses it, "to facilitate the planters whose slaves were to be put in requisition for this levee, and render it less burthensome to the owners" and the present defendant, ordered that three dollars per cubit toise should be paid, instead of two dollars per day as fixed by the 15th article of the resolution of the 15th of July. This alteration, in the mode of payment, far from being detrimental, was advantageous to the defendant. The police jury had considered, that if any negroes were put in requisition, at the usual price of two dollars per day, women or old men would have been sent, and that the completion of the work would be furthered, and the interest of the defendant promoted by this alteration of the mode of payment. Tanesse, a surveyor, and one of the witnesses who have been examined, deposes that a stout negro can complete a cubit toise of levee per day, only when the levee is but three feet high, and the dirt is at hand; and only two-thirds of a toise when it is higher and the dirt

distant, which was generally the fact in the present case.

The plaintiff contends that this regulation of the police jury is not legal, or obligatory on him, because the proceedings do not shew that two-thirds of the justices of the peace of the parish were present, as required by the act of the 25th of March, 1813.

The minute books of the police jury shew, that the title of justice of the peace is only given at the first meeting of the jury, in 1815, and not repeated afterwards; but it is apparent there were three justices present out of the five in the parish: as to the justices for the city, as they are exclusively appointed for it, it is clear that their presence cannot be expected.

Lastly, the plaintiff contends that the work which he was ordered to perform was unnecessary; and in support of this assertion, he has produced the testimony of three gentlemen.

But, who are the competent judges of the necessity of the work on levees? The police jury, and not the courts of justice. In what confusion would we not be in, if this was not the case? The legislature has given to police juries the right of making regulations in this respect, which have the force of a law. The 8th and 9th articles of the regulations of the 8th of July, 1815,

East'n District. May 1817.

FORTIER vs. M'DONOGH.

have determined the dimensions of levees, and leave the annual repairs which they may require to be ascertained by the syndic of the district, assisted by two planters of the neighborhood; and the 10th article authorises the syndic to determine the number of hands which the planter is to set at work on his levee.

All these formalities have been performed, in regard to the plaintiff, in the present case. His representations to the police jury have been listened to with patience, they have insisted on the work directed by the syndic being peformed. What weight has against this the opinion of his three witnesses, one of them his overseer, in opposition to the result of the deliberations of the jury?

MARTIN, J. delivered the opinion of the court. The 15th article of the regulations of the police jury provides that where a planter shall neglect to make the requisite repairs to his levee, on notice from the syndic, that officer will cause them to be done by slaves, put in requisition by the officer in his district, whom the judge will order to be paid out of the parish treasury, on the syndic's detailed account, and will condemn the delinquent to refund the amount.

The defendant contends that his obligation to pay for the work done, does not arise *ex contractd* but has for its origin *the law*, and the same law which imposes the obligation (if any) has fixed the particular *mode* in which he is to become liable: not on the claim of the owners of any number of slaves employed by the syndics, without any knowlege in the plaintiff of their respective rights, which would subject him to a multitude of vexatious suits, but has postponed his liability, till an account made up by the officer who superintended the labour, shall have been presented to the investigation of the parish judge and received his approbation, and protects the delinquent till after his *refusal to pay*, which implies a demand by notice of a specific sum for the whole amount due for the work. This regulation of the police jury, does not leave to the owners of the slaves put in requisition by the syndic, the right of an immediate and distinct suit against the delinquent planter. It appears to us a very convenient regulation, but if its inconveniency was equally apparent, we would answer *ita scripta est lex*. It is true the situation of the parish treasury may occasion some delay, but the planters who composed the police jury probably considered that no one could complain of this, as if the circumstance of an empty

East'n. District. *May* 1817.

FORTIER vs. M'DONOGH.

treasury, bore occasionally hard on a number of owners of slaves, called out on a sudden emergency, the disadvantage is not equal to that of a planter, harrassed by simultaneous and numerous suits, for claims the correctness of which he could not test with facility.

It is true, in the present case, the work was performed on a specific order of the police jury called *ad hoc* by the judge, who directed payment by the cubic toise, instead of the work by the day, as in ordinary cases: and the legality of the call and subsequent order has been questioned. Admitting the legality of both, as no mode of payment by the defendant was pointed out, he certainly had the benefit of any general regulations made *in prci materia*, not expressly or necessarily repealed by the latter.

The plaintiff was so sensible of this, that we find he finally sought and obtained his payment in the legal way.

This court is of opinion that he mistook, and the parish judge erred in sustaining his action, the judgment is therefore avoided, annulled and reversed, and it is ordered, adjudged and decreed that there be judgment for the defendant, with costs of suit in both courts.

INDEX

OF

PRINCIPAL MATTERS.

PAGE.

AMENDMENT.

The district court cannot amend its own judgment, after it is signed, and execution has issued; and if an appeal be brought on the judgment so amended, a statement of facts made, after its signature, is not legal. *Louisiana Bank* vs. *Hampton*, 94

APPEAL.

1 Lies from a judgment confirming the nomination of a syndic. *Enet* vs. *his creditors*, 307

2 From the improper denial of a continuance.—*Broussart* vs. *Trahan's heirs*. 489

3 But not till final judgment. *Las Caygas* vs. *Larionda's syndics*. 605

4 Or of a new trial. *Sorrel* vs. *St. Julien*. 508

5 From an order quashing an execution. *Prampin* vs. *Andry*. 314

6 From the discharge of a garnishee from his bond. *Laverty* vs. *Anderson*. 606

7 Will be dismissed, if there be neither statement of facts, bill of exception, or special verdict. *Allard* vs. *Ganusheau*. 384

8 Same point. *Brou* vs. *Herman*. *id.*

9 Same point. *Broussart* vs. *Trahan's heirs*. 516

10 Or if it does not appear that the matter in dispute exceeds the value of $300. *Mercier* vs. *Packwood.* 38

11 Will not be suffered to be dismissed by the appellant, to avoid the payment of damages, if it clearly appears that it was brought for delay only. *Shannon* vs. *Barnwell & al.* 38

12 If an order of seizure be rescinded, the plaintiff must have a statement of facts made, and the appeal will not be sustained on a bill of exceptions. *Poydras* vs. *Robillard.* 174

13 Under the Spanish government, when the appeal did not suspend the execution, there was no necessity to procure the desertion of the appeal to be pronounced, in order to give to the judgment, appealed from, the authority of the thing judged. *Le Blanc & al.* vs. *Croiset.* 27

14 A statement of facts may consist of a detail of the evidence. *Abat* vs. *Dobille.* 310

15 Although the supreme court think that the inferior ought to have charged the jury, as the appellant prayed, or ordered a new trial, if the whole case is before them, they will not remand the cause. *Same case.* id.

16 The appellant may assign error, apparent on the face of the record. *Denis* vs. *Cordeviella.* 634

17 Manner of doing this. *General rule.* 634

18 No appeal lies from the order of a court of probates, granting three months to the curator of a vacant estate to account, and directing that, on his failure, his bond shall be put in suit. *Denis* vs. *Cordeviella.* 344

19 On the dismissal of an appeal, no mandate can issue to the inferior court, to execute its judgment. *Louisiana Bank* vs. *Hampton.* 298

20 A new party made on the appeal. *Gougis* vs. *Olinde.* 96

21 If the appellant appears to have been under an error, damages will not accompany the affirmance of the judgment. *Mayor &c al.* vs. *Davis.* 533

22 The right of appeal is determined by the sum demanded, not by that recovered. *Harang* vs. *Dauphin.* 27

23 By appealing, the appellant admits that the judgment is final. *Breed* vs. *Repsher & al.* 187

24 An appeal will not be dismissed, because the authority of the person who signed the bond for the principal does not appear. *Delisle* vs. *Gaines.* 666

See VACANT ESTATE 2.

ATTACHMENT.

1 Lies against master and owners of a vessel for goods lost through their neglect. *Hunt* vs. *Norris & al.* 517

2 The condition of a garnishee's bond is complied with by his appearances and answer to interrogatories. *Laverty* vs. *Anderson.* 606

3 The creditors of the vendor may, before delivery, attach the things sold. *Norris* vs. *Mumford.* 30

See APPEAL 6.

ATTORNEY.

His irregular act may become binding on his principal by the implied ratification of the latter. *Pechaud* vs. *Peytavin.* 73

AUCTION.

If property be leased by, the auctioneer is not entitled to the allowance by law, in case of a sale, but to a compensation on a *quantum meruit*. *Dutillet & al.* vs. *Chardon*. 611

BAILMENT.

He who takes charge of a slave, without reward, is not liable for his fortuitous escape. *Bayon* vs. *Prevott*.

BILL OF EXCEPTIONS.

1 Cannot be taken to a final judgment. *Duverney's heirs* vs. *Lafon*. 96

2 Same point. *Fagot* vs. *David*. 1

BILL OF EXCHANGE.

1 A blank endorsement may be struck out at the trial. *Baker* vs. *Montgomery & al.*

2 A bill from the Quarter-Master-General, on the Secretary of the United States, needs not be prrotested in case of non-payment. *Same case*. id.

3 Notice of its non-payment must be within a reasonable time. *Pinder* vs. *Nathan and al.* 346

4 What is a reasonable time. *Same case*. id.

5 If A employs B. to purchase bills, and he gets them on his own credit from C. the latter will have no action against A. if there be no fraud or collusion. *Amory & al.* vs. *Grieve's syndics*. 682

BILL OF SALE

Of a parish judge, acting as sheriff, is good, though he takes the appellation of sheriff, and not that of judge. *Bayon* vs. *Mollere & al.* 66

CARRIER.

His liability does not begin till the goods are delivered to him. *Williams* vs. *Peytavin.* 304

CESSIO BONORUM.

1 A conveyance, at the eve of a cession, the consideration of which was not paid at the time, is void. *Roussel* vs. *Dukeylus' syndics.* 218

2 A conveyance, at the same time, to a creditor, of real property, in discharge of a debt, for which he had a lien thereon, is void. *Meeker's assignees* vs. *Williamson & al. syndics.* 625

3 The majority, in amount, of the creditors, is necessary for the choice of syndics. *Epet* vs. *his creditors.* 307

4 The choice is to be made among themselves, unless they all agree. *Same case.* *id.*

5 Privileged creditors are to concur in the choice. *Same case.* 401

6 The syndics cannot proceed till their appointment be homologated. *Dukeylus' syndics* vs. *Dumontel & al.* 466

7 The debtor not allowed to withdraw his petition, after a suggestion of fraud. *Clague & al.* vs. *Lewis & al.* 673

8 The order of stay will be rescinded, if the cession be not made at the meeting of the creditors. *Deglane* vs. *his creditors.* 697

9 After an homologation of the proceedings, it cannot be objected that the proceedings of the creditor were recorded in French. *Dussuau's Syndics* vs. *Bredeaux.* 450

10 The syndics are entitled to the property in possession of their debtor, who acted at times for himself, at others as agent, unless the principal prove his property. *Barker* vs. *Connellin's syndics.* 177

11 Syndics become personally liable, by their misconduct only. *Seghers* vs. *Visinier & al.* 80

12 In general, the ceding debtor, who has no release, is not suable till the property ceded be liquidated. *Fitzgerald* vs. *Phillips.* 290

CONSIDERATION.

A promise, in consideration of the governor being prevailed on by the promisee, to appoint the promisor to an office, is not binding. *Fauris* vs. *Morin's syndics & al.* 39

CONSIGNEE.

May sue for injury done to the goods. *Morgan* vs. *Bell.* 229

CONSOLIDATION.

If cases be consolidated, and distinct verdict and judgments be given in each, the supreme court cannot consider them as consolidated. *Esteve* vs. *Rochon.* 421

CONSTABLE.

Selling land under an execution, must advertise in the same manner as the sheriff. *Reeves* vs. *Kershaw.* 515

DAMAGES.

See APPEAL 11 & 21.

EVIDENCE.

1 The signatures and official characters of the ancient governors of Louisiana are matter of

public notoriety, and evidence of the genuineness of the former is not repuired. *Jones* vs. *Gale's curatrix.* 635

2 The signature and official character of a foreign notary may be proved by witnesses. *Las Caygas* vs. *Larionda's syndics.* 283

3 The celebration of a marriage in North Carolina may be proved by parol. *White & al.* vs. *Holstein & al.* 471

4 Parol evidence ought not to be admitted to destroy a title to real property. *Same case.* *id.*

5 An act is evidence of every disposition in it, and of what is expressed by way of recital, when it has reference to the disposition. *St. Maxent's syndics* vs. *Puche.* 193

6 An original notarial act cannot be rejected, because the keeper ought not to have parted therewith. *Baudin* vs. *Pollock & al.* 613

7 Although a suit was dismissed, the record of it is evidence between the parties. *Bore's ex'r.* vs. *Quierry's ex'r.* 545

8 The party who has offered proof of emancipation may offer evidence of a free birth. *Beard* vs. *Poydras.* 348

9 Parol evidence of an agreement for the freedom of a slave is inadmissible. *Victoire* vs. *Dusuau.* 212

EXCHANGE.

An agreement for an exchange of slaves, not signed by the parties, is invalid. *Morgan* vs. *M'Gowan,* 209

EXECUTION.

If the property advertised for sale on an execution, be not sold, it is to be advertised anew, as if it had not been advertised before. *Crocker* vs. *Watkins*. 5

EXECUTOR.

1 If a suit be not brought till thirteen years after the death of the testator, it is too late, though by the will time was allowed to the executor to complete his trust beyond the year. *Lamothe's ex'rs.* vs. *Dufour*.

2 The time during which the courts were shut, during the invasion, is to be deducted from the year which an executor has to complete his trust. *Quierry's ex.* vs. *Faussier's ex.* 29

EXPERTS.

1 If two be appointed to verify a signature, and they disagree, and on the motion of the party a third be appointed by the court, he cannot assign this as error. *Lecarpentier* vs. *Delery's ex'rs.* 437

2 Are to decide on a comparison of hand-writing, and cannot receive and act on information of the circumstances of the case. *Same case.* 454

FRAUD.

A fraudulent conveyance, gives no title to a party to the fraud. *Bayon* vs. *Mollere & al.* 621

GARNISHEE.

See ATTACHMENT.

HEIR.

1 Is not suable till he accepts the inheritance. *Cresse* vs. *Marigny*. 56

2 Same point. *Johnson* vs. *Boon's heirs.* 380

3 Is bound by a judgment obtained against the administrator. *Randal's heirs & al.* vs. *Baldwin & al.* 456

4 An estate cannot be proceeded against till there be either an heir, who accepts, or a curator. *Same case.* id

HIGHWAY.

Its soil is public property, and cannot be recovered in a suit by individuals. *Renthorp & al.* vs. *Bourg & al.* 97

HUSBAND AND WIFE.

1 When married persons remove to a new country, their rights, as to the property afterwards acquired, are regulated according to its laws. *Gale* vs. *Davis' heirs.* 645

2 Land of the wife, whether dotal or not, is not affected by the husband's debts. *Robillard* vs. *Robillard.* 603

3 If the wife behaves outrageously towards the husband, a separation will not be granted her on account of his ill-treatment. *Durand* vs. *her husband.* 174

4 A sale of land by the husband to the wife, to replace her paraphernal property, by him sold, is good. *Prevost* vs. *Prevost & al.* 506

5 A married woman has a lien for her dotal property only. *Rion* vs. *Rion's syndics.* 341; 591

INSURANCE.

The sentence of a foreign court is conclusive evidence of the national character of the ship. *Blanque* vs. *Peytavin.* 458

JETTISON.

Goods on deck not entitled to compensation therefor. *Hampton* vs. *Brig Thaddeus.*

JOINT OWNER.

Is bound to that care, which prudent men have of their property. *Guillot* vs. *Dossat.*

JUDGMENT.

1 A judgment rendered in Baton Rouge, before the United States took possession of the country, is not a foreign one. *Terry* vs. *Patton & ux.*

2 Same point. *Decker's ex.* vs. *Bradford's heirs.*

3 It is sufficiently certain, when the amount recovered clearly appears from the documents. *Same case.*

4 Which does contain none of the reasons on which it was given, nor any reference to the law, is null and void. *Gray & al.* vs. *Laverty.*

LEVEE.

Individuals required to work on that of a delinquent planter, are to be paid out of the parish treasury, and have no action against him. *Forstall* vs. *M'Donough.*

LIEN.

A builder does not lose his tacit one by his neglect to record his contract. *Layton* vs. *Saddler.*

MORTGAGE.

1 One who, to secure a debt, receives a bill of sale of slaves, instead of a mortgage, cannot take possession of them by his own act. *Baron* vs. *Phelan.*

2 If a mortgagee receive a negotiable note for his

debt, he cannot resort to his lien, without shewing that he still holds the note. *Cox* vs. *Roland's syndics*. 11

3 If a debt, secured by mortgage, be intermingled in an account with single debts of a greater amount, and a small balance due on the whole, so that it does not appear whether it be part of the mortgage or single contract debts, the mortgage will not avail. *Same case*. *id.*

4 The purchaser, under a *fieri facias*, cannot recover the money paid, on the ground that the property sold was mortgaged. *Lewis* vs. *Fraw*. 397

NATURAL CHILD.

He who claims his estate, as father, must prove his acknowledgment, by the registry of baptism, or two witnesses. *Pigeau* vs. *Ducernay*. 265

NEW-ORLEANS.

1 Mayor may abandon part of his salary. *Mayor & al.* vs. *Girod*. 698

Mayor, &c. may sue for the removal of a nuisance. *Mayor etc.* vs. *Maguon*. 2

ORDER.

For cotton, given in payment of a debt, must be presented in a reasonable time, or it will be at the creditor's risk. *Turner* vs. *Rabb*. 330

PASSAGE.

Un, de treinta pies, &c. in a Spanish deed, transfers the soil itself, not a right of way only. *Decournau* vs. *Marigny*. 708

PARTNER.

1 Contracting for the partnership, may not say he did so without authority. *Kemper* vs. *Smith*. 369

2 His private debt cannot be set off against one of the firm. *Thomas & al.* vs. *Elkins*. 370

PRACTICE.

1 Where process is ordered by the judge of an adjoining district, the presumption is, that the case was one in which he was authorised to act. *Breed* vs. *Repsher & al.* 127

2 If the defendant pleads the general issue, and that the plaintiff is his debtor, he cannot shew that the plaintiff agreed to receive his debt in Bordeaux and made no demand there. *Desbeers* vs. *Papin*. 184

3 On a rule to shew cause, in favor of a petit jury, for expenses on a levee, if the defendant denies every thing charged, the judge cannot proceed to judgment, without a trial. *Syndics etc.* vs. *Mayhew*. 171

4 If leave be given to answer, so as not to delay the trial, a right to a trial by jury is not thereby given up, although to obtain it the trial may be delayed. *Tricou* vs. *Bayon*. 10

5 In the court of the first district, no notice of trial is necessary. *Sierra* vs. *Slort*. 387

6 Saturday is not a trial day there. *Same case*. id.

7 If a suit be continued, and the party have a month to procure a deposition, the cause must be set down a new, after that time. *Same case*. id.

8 If a party dies after the *contestatio litis*, the attorney may carry on the suit. *Bochon* vs. *Montreuil*. 485

9 A *dedimus potestatem* is not necessarily to be directed to a magistrate. *Dunn* vs. *Blunt*. 677

10 When it is so directed, no proof is necessary of the commissioner being a magistrate. *Same case*. *id.*

11 In the court of the parish and city of New-Orleans, if the cause of action be stated to have arisen at Bayou St. John, this will suffice. *Delisle* vs. *Gaines*. 666

12 A judgment of dismissal ought to contain the reasons on which it is grounded. *Sierra* vs. *Slort*. 587

13 Whether the recourse of nullity against final judgments, as it prevailed under the Spanish government, be still a part of the judiciary system of the state? *Meeker's ass.* vs. *Williamson et al. syndics*. 625

14 The misbehaviour of the counsel or jury must be taken advantage of, by a motion for a new trial. *Morgan* vs. *Bell*. 615

15 A judgment by default may be made final, without assigning reasons therein. *Allard* vs. *Gannsheau*. 602

16 If there be a prayer for general relief, damages may be given beyond the specific sum claimed, if the petition shews that they are due. *Morgan* vs. *M'Gowan*. 289

17 An injunction not to molest or trouble, does not prevent a suit to ascertain a right. *Mayor &c.* vs. *Magnon*. 2

18 A sheriff, who wrongfully executes the process of a court, may be sued in another. *Clark's ex'rs.* vs. *Morgan.* 79

19 Where a cause is set down for hearing, and one of the counsel does not attend, it may be heard *ex parte*, or dismissed. *General rule.* 80

20 But it may be reinstated, on good cause shewn. *Id.*

21 When an insolvent applies to a court for relief, all suits depending against him in other courts are suspended, and his creditors must be proceeded in that court. *Cox* vs. *Zeringue.* 81

22 When a commission issues, by consent, the affidavit of the materiality of the testimony is useless. *Clay's syndics* vs. *Kirkland.* 82

23 No law requires the service of a copy of the interrogatories. *Same case.* *Id.*

24 A ceding debtor, who has obtained no discharge, is suable by the simple contract creditors, where it appears that the privileged creditors absorb all the estate, even before its liquidation. *Fitzgerald* vs. *Philips.* 89

25 A ceding debtor has his remedy against his creditors, if the syndics waste the property ceded. *Same case.* *Id.*

26 A graduate, of an incorporated American seminary, will be entitled to examination for a licence to practice law, after two years' study under an attorney. *General rule.* 550

27 Interest not allowed on a sum awarded by the verdict, which was before unliquidated. *Morgan* vs. *Bell.* 61

28 The acts of another attorney, than the one on record, are not invalid. *Clay's syndics* vs. *Kirkland.* 405

PRESCRIPTION.

Land not susceptible of alienation, cannot be acquired by. *Mayor etc.* vs. *Magnon.* 2

PRISON BOUNDS.

A person there confined, under judgment from the district court, may be discharged by the parish court. *Cox* vs. *Zeringue.* 261

PROTEST.

The protest of a bill of exchange proves itself. *Cazeau* vs. *Sagory.* 81

PROMISSORY NOTE.

1 The holder of a negociable note, endorsed in blank, may sue thereon. *Allard* vs. *Gunnoston.* 662

2 If one puts his name on the back of a note, not negociable, the presumption is, that he meant to become surety for the signer. *Cooley* vs. *Lawrence.* 639

3 His liability does not depend on the fulfilment of the formalities required by the liability of an endorser. *Same case.* id.

4 The payee may recover from such a surety, although he has neglected to sue the principal, or through delay may have suffered some advantage to be lost, whereby the surety is placed in a worse situation. *Same case.* id.

5 If an endorser receive back a note from his endorsee, he may recover from the payor without a re-endorsement. *Delisle* vs. *Gaines.* 666

RESIDENCE.

If the year of residence of an insolvent debtor expire after he has been confined thirty days, and he applies for the benefit of the insolvent law thirty days after, he cannot be released. *Rhendorff vs. his creditors.* 308

SALE.

1 If a slave be sold as *bon domestique, cocher et briquetier*, and he be proven to be a good servant and a coachman and brick-maker, this will suffice. *Duncan vs. Cevallo's heirs.* 171

2 A runaway slave cannot be sold by the sheriff till three years after the date of the advertisement. *La Branche vs. Watkins.* 301

3 If a sheriff sell a runaway, and instantly take a bill of sale from the vendee for the same price, the sale will be presumed fictitious. *Same case.* id.

4 An order for the delivery of the thing sold is not a delivery of it. *Norris vs. Mumford.* 80

5 The creditor of the vendor may attach the thing sold before delivery. *Same case.* id.

6 In a sale by the sheriff of real property on credit, a deed of mortgage, signed by the vendee, is not necessary. *Clark's ex'rs. vs. Morgan.* 280

SLAVE.

1 A negro will be presumed free, though purchased as a slave, in a country in which slavery is not tolerated, unless he be proven to have been before in one in which it is. *Forsyth & al. vs. Nash.* 297

2 When the person who claims the defendant as a slave has proven his slavery, he cannot contest the plaintiff's title. *Trudeau's ex'rs. vs. Robinette.* 577

3 The deed of emancipation of a slave, under thirty years of age, is void. *Same case.* *id.*

STIPULATION.

Avails an absent, in whose favor it is made, *Smith vs. Kemper.* 409

SURETIES.

1 Those of an auctioneer are not liable, if goods in his hands, and on which he had a lien, on the termination of his office, are afterwards sold under a new commission, and he fail to account for the proceeds. *Claiborne vs. Deban & al.* 534

2 A joint suit may be brought against the principal and surety. *Bernard & al. vs. Curtis & al.* 214

TUTOR.

By nature, retains the tutorship when he removes out of the state with his ward. *Latrobe vs. Boisblanc.* 715

VACANT ESTATE.

1 He who opposes a curator's appointment, may shew the applicant is not domiciliated, and possesses no property in the state; and that he is a resident, possesses property in the state, is a large creditor of the estate, and was an old friend of the deceased. *Rust vs. Randolph.* 370

2 An appeal lies to the district court, and thence to the supreme court, on the appointment of a curator. *Same case.* *id.*

3 On such an appeal, the district court ought to try the cause *de novo*. *Same case.*

4 The curator may be sued without his ayretion being joined. *Denis* vs. *Cordeviella.*

5 The money recovered from him is not to be paid to the attorney of the absent heirs, but into the treasury. *Same case.*

WITNESS.

1 The defendant's co-trespasser may be a witness for him. *Herang* vs. *Dauphin.*

2 An agent, entitled to a commission, may be a witness for his principal. *Cuene* vs. *Sagory.*

3 A witness testifying against his interest, is not to be rejected. *White & al.* vs. *Holsten & al.*

4 A witness, whose deposition has been taken by one of the parties, may be examined by the other. *Bayon* vs. *Mollere & al.*

5 One who never saw the party write, but has frequently received letters from him, may prove his hand-writing. *Clay's syndics* vs. *Kirkland.*

6 The ceding debtor cannot be used as a witness by his syndics. *Same case.*